

(2015) 11 KAR CK 0337

In the Karnataka High Court

Case No : Writ Appeal No. 4527/2010 (GM-KSFC)

Karnataka State Financial Corporation

APPELLANT

Vs

R. Srinivas and Others

RESPONDENT

Date of Decision : 17-11-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Contract Act, 1872 — Section 126, 128, 129
Limitation Act, 1963 — Section 19
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 14, 17, 17(1)
State Financial Corporations Act, 1951 — Section 24, 29, 3, 31(1)(aa)

Citation : (2016) 2 KarLJ 262

Hon'ble Judges : Mohan M. Shantana Goudar and B. Veerappa, JJ.

Bench : Division Bench

Advocate : Gururaj Joshi, Advocate, for the Appellant; M. NaganandAdvocateCounsel for Naveen Chandrashekar and M. Rangaswamy Law Chambers, for the Respondent

Final Decision : Allowed

Judgement

B. Veerappa, J.—The above matter has been remanded from the Hon''ble Supreme Court in Civil Appeal No. 10437/2013 decided on 19th November, 2013. This Court is directed to decide the appeal afresh after giving an opportunity of hearing to the present appellant/KSFC and respondents herein in accordance with law.

2. The factual matrix of the case are:

The appellant/Corporation has been established by the Government of Karnataka under the provisions of Section 3 of the State Financial Corporation Act (hereinafter referred to as "the SFC Act") and the Corporation has to deal with the funds on business principles having due regard to the interests of the industry, commerce and the general public as required under the provisions of Section 24 of the SFC Act and in accordance with the required Financial

Discipline. The Financial Corporation discharges the public duty while disbursing loan as well as while recovering the same from the beneficiaries for recycling. That one M/s. Sunsu Garments Pvt. Ltd., had availed the financial assistance of Rs. 26 lakhs from the appellant/Corporation on 31.3.1989 payable in 23 quarterly installments and an additional term loan of Rs. 31 lakhs was obtained on 31.3.1995 payable in 18 quarterly installments and the 1st respondent/petitioner stood as guarantor to the said loan of M/s. Sunsu Garments Pvt. Ltd., by mortgaging his property. The principal borrower committed default and was subjected to liquidation by the process of this Court and the company was wound up by an order dated 24.7.2000. The appellant/Corporation having no other option, initiated recovery proceedings against the guarantors and for the sale of the collateral security mortgaged by the 1st respondent. It is further case of the appellant/Corporation that the principal borrower had lastly paid a sum of Rs. 6,17,000/- on 20.3.1999 towards the dues as on that date and cause of action arose for non payment of regular installments as on September, 1999 and immediately, the liability was crystallised on 2.4.2001. Accordingly, the appellant had initiated recovery action in Misc. No. 370/2001. During the pendency of the said proceedings, the subject schedule property was deleted from the said proceedings by an order dated 16.6.2005. Later the appellant/Corporation initiated recovery proceedings against the mortgaged property under the provisions of Section 29 of the SFC Act, 1951 by issuing a notice dated 6.8.2005. Aggrieved by the said notice, the 1st respondent filed a writ petition i.e., W.P. No. 25001/2005 before this Court and subsequently, the appellant withdrew the said notice in the light of the law declared by the Apex Court in the case of N. Narasimhaiah vs. KSFC [(2008) 5 SCC 176] and this Court disposed of the said writ petition permitting the appellant/Corporation to proceed in accordance with law against the 1st respondent's property which was mortgaged to the appellant/Corporation.

3. The appellant, thereafter initiated proceedings against the property mortgaged by the 1st respondent under the provisions of the Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (for short hereinafter referred to as "SARFAESI Act") by issuing notice dated 23.9.2008 demanding the due amount. Aggrieved by the said demand notice, the 1st respondent filed W.P. No. 14820/2008 before this Court and the learned Single Judge of this Court, after hearing both the parties, by an order dated 21st October, 2010 allowed the said writ petition and quashed the notice dated 23.9.2008 on the ground that the impugned action of the appellant to proceed against the 1st respondent under the provisions of Section 13(2) of the SARFAESI Act was barred by limitation.

4. Aggrieved by the order passed by the learned Single Judge of this Court, KSFC/ the present appellant herein has filed the above appeal and this Court after hearing both the parties to the lis by the order dated 3rd December, 2012 allowed the writ appeal and set aside the order passed by the learned Single Judge reserving liberty to the 1st respondent/petitioner to file an appeal under

the provisions of Section 17 of the SARFAESI Act before the Debt Recovery Tribunal against the order passed under the provisions of Section 13(4) of the SARFAESI Act within 60 days. It was also directed that till such time, no action shall be taken by the Corporation and liberty was reserved to the appellant to seek appropriate interim orders. The Division Bench then held that the writ petition against the notice under the provisions of Section 13(2) of the SARFAESI Act was not maintainable. Against the said order passed by the Division Bench of this Court, the 1st respondent filed Civil Appeal No. 10437/2013 before the Hon"ble Supreme Court of India and the Hon"ble Supreme Court, by its order dated 19.11.2013 set aside the order passed by the Division Bench of this Court and remitted the matter for fresh consideration after giving an opportunity of hearing to the KSFC and pass fresh orders in accordance with law. This is how the matter is before this Court.

5. We have heard the learned Counsel for the parties to the lis.

6. Sri Gururaj Joshi, learned Counsel for the appellant/Corporation vehemently contended that the impugned order passed by the learned Single Judge is against the provisions of SARFAESI Act which is not permissible. He also contended that the borrower paid the last installment on 20.3.1999 and the cause of action and the period of limitation accrued from that day onwards as per the provisions of Section 19 of the Limitation Act. Further the action of the appellant/Corporation issuing notice dated 23.9.2008 was within the limitation period as contemplated under the provisions of Section 36 of the SARFAESI Act. He further contended that the limitation starts from 20.3.1999 and the notice issued to the 1st respondent on 23.9.2008 under the provisions of Section 13(2) of SARFAESI Act is within the limitation period under the provisions of Article 62 of the Limitation Act; the provisions of Section 137 of the Limitation Act is not applicable. He also contended that, initially the appellant had initiated action against respondent No. 1 in Misc. No. 370/2001 way back in the year 2001 itself by exercising the Doctrine of Election, but now the appellant is proceeding against the mortgaged property which is a secured asset under the provisions of the SARFAESI Act which is in accordance with law. The writ petition filed is not maintainable and the 1st respondent herein i.e., writ petitioner has not exhausted an alternative remedy of appeal under the provisions of Section 17 of the SARFAESI Act and hence, he sought to set aside the order passed by the learned Single Judge. In support of his contentions, he sought reliance mainly on the dictum of the Hon"ble Supreme Court in the case of United Bank of India Vs. Satyawati Tondon and Others, .

7. Per contra Sri M. Naganand, learned Senior Counsel appearing for Sri Naveen Chandrashekar for respondent No. 1/petitioner contended that the impugned notice dated 23.9.2008 is illegal and is in violation of the provisions of the SFC Act and Limitation Act. He also contended that invoking the provisions of Section 13(2) of the SARFAESI Act is illegal and SARFAESI Act does not confer any power upon the appellant/Corporation and the same is not permissible. The appellant/

Corporation does not qualify as a "Financial Institution" which is entitled to exercise any power under Section 13(2) of the SARFAESI Act. It is further contended that the appellant does not come either within the scope of definition of any of the expressions in Section 2 of the SARFAESI Act or within the scope of a "Secured Creditor" under Section 2(zd) as it is not a "Financial Institution" as defined in Section 2(m) of the SARFAESI Act. It was his further contention that the claim now made by the appellant is barred by limitation as the so-called "mortgage" was created, even according to the appellant/Corporation, in the year 1995. Under the General Law applicable to mortgages, the period of limitation has already run out and it is impermissible to launch the present proceedings when the Limitation Law applies to Securitisation Act also and he sought to justify the impugned order passed by the learned Single Judge. He also contended that the alternative remedy as contended by the appellant/Corporation is not an efficacious remedy and the same cannot be invoked at this distance of time and therefore, he sought for dismissal of the appeal. In support of his contentions, he mainly relied upon the dictum of the Hon'ble Supreme Court in the case of L.K. Verma Vs. H.M.T. Ltd. and Another, .

8. We have given our thoughtful consideration to the arguments advanced by the learned Counsel for the parties and perused the entire material on record.

9. It is not in dispute that the appellant/KSFC gave financial facility to M/s. Sunsu Garments Pvt. Ltd., and the said Company had not given any immoveable property as security for the loan borrowed but the factory was on a lease land and security was only by hypothecation of plant and machinery for the loan granted by the KSFC. However, the 1st respondent/petitioner offered his property measuring 40" x 50" with a 40 year old building as security for due repayment of loan borrowed by the Company. Thereafter, the said Company could not pay its dues and cope up its commitment. Thereafter, a company petition bearing No. 147/1997 was filed before this Court and this Court on 24.7.2000 passed an order for winding up of the company and an official liquidator was appointed to take charge of the company. After taking charge, the official liquidator was able to recover only Rs. 14 lakhs due to the Company. On 12.12.2001, a legal notice was issued to the 1st respondent calling upon him to pay a sum of Rs. 93.88 lakhs under the provisions of the SFC Act which was followed by another notice under the provisions of Section 31(1)(aa) of the SFC Act. Thereafter a notice under the provisions of Section 29 of the State Financial Corporation Act, 1951 was issued against the surety. Challenging the said notice, the 1st respondent/writ petitioner filed Writ Petition No. 25001/2005 before this Court which came to be disposed of on 18th September, 2008 after recording the statement made in the memo that the Corporation will not pursue the remedy under the provisions of Section 29 of the SFC Act. Thereafter on 23.9.2008, a fresh notice was issued under the provisions of Section 13(2) of the SARFAESI Act to which the 1st respondent/writ petitioner sent his reply dated 21.11.2008 contesting the claim. Thereafter, considering the objections raised by the 1st respondent/petitioner, the appellant/Corporation sent a reply on 3.12.2008 giving reasons for not

accepting the objections raised by the 1st respondent/writ petitioner. In the meanwhile, the 1st respondent preferred a writ petition i.e., W.P. No. 14820/2008 challenging the demand notice issued under the provisions of Section 13(2) of the SARFAESI Act and the order dated 25.8.2009 under the provisions of Section 13(4) of the SARFAESI Act. The writ petition challenging the notice issued under the provisions of Section 13(2) of the SARFAESI Act was premature, and against the order passed by the KSFC under the provisions of Section 13(4) SARFAESI Act, the 1st respondent/writ petitioner has got an alternative remedy of appeal under the provisions of Section 17 of the SARFAESI Act. The writ petition questioning the notice under the provisions of Section 13(2) of the SARFAESI Act was not maintainable in view of the dictum of the Apex Court in the case of Digivision Electronics Ltd., vs. Indian Bank (MAD) reported in 630 Company Cases 136 at para 42 which reads as follows:

"Some of learned counsel submitted that the court should direct one time settlement or fixing of instalments or rescheduling the loan. In Tamil Nadu Industrial Investment Corporation Ltd. Vs. Millenium Business Solutions Pvt. Limited and Another, it has been held that this court cannot pass any such order in writ jurisdiction, since directing one time settlement or granting instalments is really rescheduling the loan, which can only be done by the bank or financial institution which granted the loan. This Court under article 226 of the Constitution cannot reschedule a loan. A writ is issued when there is violation of law or error of law apparent on the face of the record, and not for rescheduling loans. The Court must exercise restraint in such matters, and not depart from well settled legal principles."

10. It is an admitted fact that Ms/Sunsu Garments Pvt. Ltd., had borrowed the loan from the appellant/KSFC and the 1st respondent/petitioner stood as the guarantor. It is also not in dispute that the principal borrower/Company was wound up by an order of this Court dated 24.7.2000 in Company Petition No. 143/1997 and the debt was declared as non performing asset on 9.9.2008. A notice under Section 13(2) of the SARFAESI Act was issued to the borrower on 23.9.2008. It is also relevant to mention here that the definition of word "borrower" includes guarantor or mortgager. After service of notice under Section 13(2) of the SARFAESI Act, the 1st respondent/writ petitioner gave his reply on 25.11.2008 raising various objections. Considering the said reply, the KSFC over ruled the objections on 3.12.2008. Even before the said reply was received by the 1st respondent/writ petitioner, he approached this Court challenging the proceedings under the provisions of Section 13(2) of the SARFAESI Act by filing a writ petition on 27.11.2008 and subsequently, under the provisions of Section 13(4) of the SARFAESI Act, a final order dated 25.8.2009 was passed which is appealable. If an order is passed under the provisions of Section 13(4) of the Statute, an efficacious remedy by way of appeal under the provisions of Section 17 of the SARFAESI Act is provided before the Debt Recovery Tribunal for having jurisdiction in the matter within 45 days from the date on which such measures having been taken. Admittedly, in the present

case, the 1st respondent/writ petitioner has not filed any appeal and has not exhausted an alternative remedy as provided. Hence the writ petition was liable to be dismissed on the ground of maintainability and availability of alternative statutory remedy.

11. It is also an admitted fact that the claim made by the KSFC, the agreement and account extracts relied upon by the KSFC/appellant are disputed by the 1st respondent/writ petitioner and there are disputed facts arising between the parties to the lis and such disputed facts cannot be decided by this Court while exercising the powers in the writ jurisdiction under Articles 226 and 227 of the Constitution of India and this Court cannot reschedule a loan which requires evidence including production of documents. It is a well settled law that when a question is a mixed question of law and fact, if the parties want to lead evidence, it has to be recorded and a finding has to be recorded based on the evidence to be adduced by both the parties. Such an exercise cannot be gone into under the writ jurisdiction. On that ground also, the writ petition was liable to be dismissed.

12. The Hon"ble Supreme Court in the case of Syndicate Bank Vs. Channaveerappa Beleri and Others, while considering the provisions of Sections 126 , 128 and 129 of the Contract Act and Article 55 of the Limitation Act at para-9 has held as under:

"9. A guarantor"s liability depends upon the terms of his contract. A "continuing guarantee" is different from an ordinary guarantee. There is also a difference between a guarantee which stipulates that the guarantor is liable to pay only on a demand by the creditor, and a guarantee which does not contain such a condition. Further, depending on the terms of guarantee, the liability of a guarantor may be limited to a particular sum, instead of the liability being to the same extent as that of the principal debtor. The liability to pay may arise, on the principal debtor and guarantor, at the same time or at different points of time. A Claim may be even time-barred against the principal debtor, but still enforceable against the guarantor. The parties may agree that the liability of a guarantor shall arise at a later point of time than that of the principal debtor. We have referred to these aspects only to underline the fact that the extent of liability under a guarantee as also the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract."

13. Though the learned Senior Counsel appearing for the respondent relied upon the judgment of the Apex Court in the case of L.K. Verma Vs. H.M.T. Ltd. and Another, to the effect that in any event, once a writ petition has been entertained and determined on merits of the matter, the Appellate Court, except in rare cases, would not interfere there with only on the ground of existence of alternative remedy; in the subsequent judgment, the Apex Court in the case of United Bank of India Vs. Satyawati Tondon and Others, while considering the provisions of Section 13(2) and (4) of the SARFAESI Act and scope and interference of High Court under Article 226 of the Constitution of India has held as under;

"42. There is another reason why the impugned order should be set aside. If respondent No. 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14 , then she could have availed remedy by filing an application under Section 17(1) . The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14 . Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

(emphasis supplied)

14. Whether the provisions of Article 62 or Article 137 of the Limitation Act would apply in the present case as contended by the learned Counsel for the parties to the lis shall also be adjudicated by the Appellate Authority/Debt Recovery Tribunal with reference to the evidence and material documents to be adduced and produced by both the parties.

15. In view of the admitted fact of availing loan from the appellant/Corporation and the 1st respondent/petitioner having stood as the guarantor and admittedly a notice under the provisions of Section 13(2) of the SARFAESI Act was issued which was challenged before the learned Single Judge and even before passing of

the final order on the reply made by the 1st respondent/writ petitioner, a writ petition was filed by the 1st respondent/writ petitioner prematurely. Subsequently, a final order was passed after considering the objections filed by the 1st respondent exercising the powers under the provisions of Section 13(4) of the SARFAESI Act, that the 1st respondent/writ petitioner has got an alternative remedy of appeal under the provisions of Section 17 of the SARFAESI Act. As the claim made by the KSFC, agreement between the parties and account extracts produced are also disputed by the 1st respondent and as there are disputed facts arising in the writ petition, the same cannot be adjudicated in a writ jurisdiction while exercising the powers under Articles 226 and 227 of the Constitution of India. As the question of limitation is a mixed question of law and the fact which requires to be proved by proper evidence and production of documents. Respondent No. 1 can very well avail the same before the Debt Recovery Tribunal under the provisions of Section 17 of the SARFAESI Act. In view of the dictum of the Apex Court stated supra, we are of the considered opinion, that the writ petition was not maintainable before the learned Single Judge.

16. In view of the above said reasons, we pass the following:

- i) Writ Appeal is allowed;
- ii) The impugned order dated 21.10.2010 passed in W.P. No. 14820/2008 by the learned Single Judge is set aside. The writ petition is dismissed as not maintainable with liberty to the 1st respondent/petitioner to avail an alternative remedy by filing an appeal/application under the provisions of Section 17 of the SARFAESI Act before the Debt Recovery Tribunal within 2 months from the date of receipt of this judgment;
- iii) The Debt Recovery Tribunal is directed to provide an opportunity to both the parties to the lis to adduce evidence and produce documents and pass appropriate order in accordance with law;
- iv) Till such time, no action shall be taken by the KSFC and it is also open for the parties to seek appropriate interim order in accordance with law.

All the contentions urged in the present appeal are left open to both parties to be urged before the Debt Recovery Tribunal.